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IN THE

Supreme Court of the United States

October Term, 1962

No. 441

ROBERT FREDERICK HUFF and WILLIAM CONSTANTINE NICHOLSON,

Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners, Robert Frederick Huff and William Constantine Nicholson, petition that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fifth Circuit (App. A, *infra*; R. 417)[1] which affirmed a judgment of the United States District Court for the Western District of Texas convicting them on an indictment charging violation of and conspiracy to violate the Wire Fraud Statute, 18 U. S. C. 1343.

Opinions Below

The opinion (R. 400) and dissenting opinion (R. 415) below (App. B, *infra*) are reported at 301 F. 2d 760.

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[1] We use "R." to designate the record from the court below and "App." to refer to the appendices to this petition.

Jurisdictio

The judgment of the Court of Appeals is dated and was entered on April 19, 1962 (App. A, *infra*). A timely petition for rehearing (R. 421) was denied on July 23, 1962 (R. 436). On August 7, 1962, an order was entered by Mr. Justice Black extending the time for filing a petition for certiorari to and including September 21, 1962. Jurisdiction of this Court is conferred by 28 U. S. C. 1254(1).

Questions Presented

1. Whether a scheme to obtain money from a victim by causing his son to be arrested and held until the victim pays money to effect the son's release is a scheme to obtain money by false pretenses in violation of 18 U. S. C. 1343 because it involves the making of false pretenses to the son for the purpose of luring him to the place where the arrest is to occur.

2. Whether an indictment for conspiring to violate 18 U. S. C. 1343 is valid which charges a conspiracy to use wire communication in foreign commerce for the purpose of executing a fraudulent scheme but does not describe the nature of the scheme except for the bare statement that it was a scheme to defraud a named person.

3. Whether an accused may be convicted of conspiring to violate 18 U. S. C. 1343 where there is no evidence that he intended, concurred in, or knew of the use by his alleged co-conspirator of interstate or foreign communication by wire for the purpose of executing the alleged scheme to defraud.

4. Whether an accused may be convicted of violating 18 U. S. C. 1343 and of conspiring to violate it where there is no evidence that he had knowledge of or intent to effectuate the fraudulent scheme and where all that the evidence showed was his presence while the scheme was in course of execution.

Statutes Involved

18 U. S. C. 1343, the Wire Fraud Statute, reads as follows:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

18 U. S. C. 371, the general conspiracy statute, in pertinent part, reads as follows:

> "If two or more persons conspire * * * to commit any offense against the United States, * * * and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Statement of the Case

The indictment.

Petitioners and one Duran were indicted on six counts for violating the Wire Fraud Statute, 18 U. S. C. 1343, and on a seventh count for conspiring to violate it (R. 1-7).

Each substantive count (R. 1-5) charges a scheme to defraud one Salim Abraham by inducing the latter's son, Nazry Abraham, to go to Juarez, Mexico, from El Paso, Texas, on the pretense that he could there assist in recovering jewelry allegedly stolen from petitioner Huff, whereas in fact the defendants had arranged the arrest of Nazry Abraham by Mexican authorities in Juarez for the purpose of representing to his father that upon payment

of $22,000 the defendants would assist in the release of the son. Each count then alleges that the defendants made one of a series of six telephone calls from Juarez to El Paso for the purpose of executing the scheme.[2]

The conspiracy count (R. 5-7) merely charges that the defendants conspired to use the wires from Juarez to El Paso over a period of nine days in April, 1960, for the purpose of executing a scheme to defraud Salim Abraham. The charging part of the count contains no further description of the scheme, nor does it identify the scheme as the one described in the substantive counts.

Petitioners' motions to dismiss the indictment (R. 8-13) were denied (R. 14-15).

The disposition of the case as to Duran.

Duran was not arrested or tried (R. 20). Evidence relating to him was admitted, but at the close of the case the jury was instructed (R. 360) that his participation in the alleged conspiracy had not been established, and hence that the jurors were not to consider his acts or declarations in arriving at their verdict.

The convictions and sentences.

Petitioners were convicted on all seven counts (R. 373). Huff was sentenced to two years on each of the six substantive counts, to run concurrently, and to five years on the conspiracy count, to run consecutively to the sentences on the substantive counts. Nicholson was sentenced to five years on each of the seven counts, to run concurrently (R. 380).

The evidence.

In 1957, Huff, in the presence of Nicholson, accused one Nazry Abraham, a gambling companion, of stealing $22,000

[2] Two calls are alleged to have been made on April 22, 1960, and one on the 23rd, 25th, 26th and 27th of that month.

in money and jewels from his El Paso apartment. Abraham denied the charge (R. 23-25, 282-84, 292-94). Nothing further occurred with respect to the matter for the following three years.

Twice on April 22, 1960, and again on April 23, April 25 and April 26, Nazry Abraham, in El Paso, telephoned Huff in the same city to tell him, on each occasion, that he had received a call with respect to the stolen jewelry.[3] On each occasion, Huff suggested that Abraham go to Juarez and attempt to recover it. Abraham agreed to do so in their talk of April 26 (R. 22-23, 26-29).

Abraham went to Juarez that day. Upon his arrival in front of the Club Taurino, a night club there, he was arrested by several Mexican Federal Police officers and driven to a jail in Guadalupe, some 30 miles away. That evening, he signed a confession that he and Duran had committed the Huff robbery. On the stand, he repudiated the confession, stating that it had been coerced by the police. After signing the confession, he asked the officers to send for his father, Salim Abraham,[4] and for Huff (R. 29-40, 58).

On the morning of the following day, April 27, Salim in El Paso received a phone call from Huff who stated that he

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[3] Abraham was permitted to testify that each of his calls to Huff had been preceded, as he informed Huff, by a call from Duran in Juarez (R. 22-23, 26-29). These calls are the subject of the first five counts of the indictment. However, by instructing the jury to disregard all evidence of acts and declarations of Duran (R. 360), the trial court withdrew the only evidence that the calls were made from the jury's consideration. Accordingly, it was error to submit the first five counts to the jury. The court below held the error harmless because the sentences on them are concurrent with that on the sixth count (App. B, *infra*, p. 29).

[4] For simplicity, we use the first names of the Abrahams hereafter.

was at a restaurant in Juarez.[5] According to Salim, Huff said, "Come over here, I have your son here, come alone, I want to talk with you about him" (R. 121). Salim drove at once to Juarez where he met Huff in the restaurant. In their talk, Huff accused Nazry of having committed the robbery, said that Nazry was in the hands of "the federal agents" and demanded $22,000 to effect his release.[6] During this conversation, several men who identified themselves as "federal agents" joined in and urged Salim to accept Huff's proposal. Salim refused to discuss the matter until he first saw his son. Accordingly, Salim, Huff and several of those with them left the restaurant. Outside, Salim was directed to an automobile, driven by a man he later identified as Nicholson, in which they all drove to Guadalupe (R. 125-29).

Nicholson testified that he had met Huff at the restaurant by chance, had not been present at the talk with Salim, and had acted as chauffeur as a favor to Huff (R. 286-87).

On arrival in Guadalupe, Huff and Salim were taken to Nazry. In response to Huff's question, Nazry admitted committing the robbery (R. 129-30). On the stand, the latter testified that his admission was the result of fright (R. 58).

Following the visit to Nazry, Salim, out of Nicholson's presence, agreed to pay Huff $12,000 for the release of his son (R. 130). Nicholson then drove the two men to El Paso

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[5] This is the call alleged in the sixth count of the indictment and the only jurisdictional use of the wires which survived the action of the trial judge in removing all evidence of Duran's acts and declarations from the consideration of the jury (p. 5, n. 3, *supra*).

[6] It appears from the testimony of another witness that Nazry's arrest was on a complaint signed by Huff. (R. 224-25). There is no evidence, however, that Huff ever mentioned the complaint to Salim or that Salim knew of its existence.

where Salim borrowed $15,000 from his bank after arranging to meet Huff at the Juarez restaurant within an hour (R. 130-31).

When Huff and Nicholson arrived at the restaurant, they were arrested by the Juarez police (R. 133-34), apparently as a result of the efforts of Salim's son-in-law (R. 91-110).

Meanwhile, that afternoon, a Mexican officer took Nazry from Guadalupe to a small border town and then to the jail in Juarez where he was released later in the evening (R. 41-45).

Huff and Nicholson were jailed in Juarez for four months and then released without prosecution (R. 285, 289-91).

The opinions below.

The majority below sustained the indictment, held that the evidence was sufficient to establish a scheme to defraud and not merely to extort, and further held that the evidence warranted the verdicts against both defendants on the sixth and seventh counts of the indictment (App. B, pp. 27-29, *infra*).[7]

Judge Jones, dissenting, would have reversed as to Nicholson on both counts since the evidence showed no more than his "mere presence" (*id.*, pp. 34-35, *infra*). Had this view prevailed, a reversal of Huff's conspiracy conviction would also have been required. For, in view of the trial court's instruction ruling out Duran as a conspirator (p. 4, *supra*), no one would have remained with whom the jury could have found that Huff conspired.

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[7] For the reasons stated above (p. 5, n. 3, *supra*), the court found it unnecessary to consider the validity of the convictions on the first five counts.

Reasons for Granting the Writ

Undeniably, there was evidence in the case from which the jury could find a scheme on Huff's part to obtain money from Salim Abraham. However, the important question which this case presents is whether the scheme constitutes a federal offense or whether this is not another instance in which the federal fraud and conspiracy laws have been stretched to secure convictions for conduct which, if criminal, is punishable solely under state law (Points I and III, *infra*). Cf. *Parr* v. *United States*, 363 U. S. 370. Additionally, in two aspects, the decision below is in conflict with long established principles for the administration of federal criminal justice (Points II and IV, *infra*).

I. At most, the substantive counts of the indictment allege and the evidence establishes a scheme to use the wires to extort, not to defraud. Accordingly, no federal offense was charged or proved.

A scheme to obtain money by intimidation or the coercion of fear rather than by deceit is not punishable under the Mail or Wire Fraud Statutes. *Fasulo* v. *United States*, 272 U. S. 620. It is of the essence of the offense under these statutes that: "The person devising the fraudulent scheme must intend in some manner to delude the person upon whom the scheme is to be practiced." *Norton* v. *United States*, 92 F. 2d 753, 755 (C. A. 9). The substantive counts of the indictment and the evidence as to all counts violate this principle.

A. The indictment.

The six substantive counts charge "a scheme and artifice to defraud Salim Abraham" (R. 1-5). But the only false statement they mention is alleged to have been made, not to Salim Abraham, but to Nazry. This is the statement allegedly made by the defendants to induce Nazry to

go to Juarez on the false pretense that he could assist in recovering the Huff jewels. The indictment does not, as it could not, allege that the scheme contemplated that Salim Abraham would be deceived by or part with his money on the strength of this pretense. What it alleges is that the scheme contemplated representing to Salim Abraham that the defendants would secure the release of his son on payment of $22,000 (R. 2). It was by means of *this* representation, according to the indictment, that the defendants planned to obtain money from Salim. Yet, there is no charge that the representation was false.

Thus, the substantive counts of the indictment do not allege that the defendants intended to obtain money from Salim by deceit. At most, they charge a scheme to put him in fear of his son's safety and so to obtain money from him by intimidation. But such a scheme is not punishable under the Wire Fraud Statute or any other federal law. Accordingly, the substantive counts should have been dismissed. As we later show (*infra*, p. 11) the conspiracy count contains no description of the alleged scheme and should have been dismissed for that reason.

B. The evidence.

The court below, disregarding the defects in the indictment (App. B, *infra*, p. 27), sustained the convictions for both the substantive offenses and conspiracy on the ground that "the whole scheme from beginning to end amounted to trickery and deceit" (*ibid.*, p. 28). The "trickery and deceit" on which it relied (*ibid.*) were the following: (1) Huff's statements to Nazry to lure him to Mexico; (2) Huff's accusation, made to Salim, that Nazry had robbed him; (3) Huff's statement to Salim "that Nazry was under legal arrest based on a legal complaint," and (4) Huff's statement to Salim that he could obtain Nazry's release for $22,000.

Neither singly nor collectively can the four statements make out a scheme or conspiracy to defraud Salim on Huff's part, let alone on the part of Nicholson, who was not shown to be connected with any of them. The first, not made to Salim, is inapplicable for the reasons given above. As for the fourth, the jury could not rationally have found it to be false. For, as the opinion below states (App. B, *infra*, p. 24), the evidence (R. 41-45) established that arrangements for Nazry's release were made as soon as his father's agreement to pay the money had been obtained.

All that remains, then, is Huff's accusation of Nazry to Salim and what the court below says was his representation to Salim that the arrest was legal.[8] It is plain, however, that Salim's acceptance of the truth of these representations was not an element of the scheme. The accusation and signing of a complaint against Nazry were necessary, of course, to secure his arrest. But once the arrest was effected, the scheme depended on inspiring Salim with fear for his son's safety, not on deluding him into the belief that the son was guilty or that the arrest was legal. Indeed, neither the draftsman of the indictment nor the trial judge thought that the existence of a fraudulent scheme turned on the falsity of these representations. For the indictment does not mention them, much less charge that they were false. And the trial judge refused to instruct the jury that it could not convict if it found that Huff's accusation of Nazry was true (R. 367-68).

Accordingly, even if the court below were correct in holding that the scheme involved false representations to Salim that Nazry was guilty of robbery and had been legally arrested, a reversal of the convictions on all counts

[8] All that Huff said to Salim about the arrest was, "Your son is in the hands of the federal agent" (R. 126). Moreover, the only evidence on the subject is the testimony of a Mexican lawyer that the arrest was in fact a legal one (R. 221-25).

would be required nevertheless. For in that event, petitioners were convicted for a scheme with which they were not charged [9] and, in view of the refusal of the requested instruction, of which they were not found guilty. *Cole* v. *Arkansas*, 333 U. S. 196.

II. The conspiracy count of the indictment is defective because it lacks any description of the nature of the fraudulent scheme which was the subject of the alleged conspiracy.

The charging portion of the conspiracy count, in its entirety, reads as follows (R. 5-6):

> "That commencing on or about April 20, 1960; and continuing thereafter until on or about April 28, 1960, in El Paso County, Texas, within the El Paso Division of the Western District of Texas, Robert Frederick Huff, William Constantine Nicholson and Antonio Duran, having devised and having intended to devise a scheme and artifice to defraud Salim Abraham, and to obtain money by means of false and fraudulent pretenses, representations and promises, unlawfully conspired, confederated and agreed together to transmit sounds and to cause sounds to be transmitted, by means of wire communication in foreign commerce, from Juarez, Chihuahua, Mexico, to El Paso, Texas, for the purpose of executing such scheme and artifice and attempting so to do, in violation of Section 1343 of Title 18, United States Code, and to effect the object of their said conspiracy they did the following acts:".[10]

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[9] As we show in the next point, this is true of the convictions for conspiracy as well as for the substantive offenses.

[10] This is followed by a listing of sixteen overt acts. An insufficiency in the charging part cannot, of course, be cured by reference to the overt acts. *United States* v. *Britton*, 108 U. S. 199, 204-05; *Hamner* v. *United States*, 134 F. 2d 592, 595 (C. A. 5).

This allegation omits any description of the nature of the fraudulent scheme which the defendants are charged with executing. Nor does it identify the scheme by reference to the substantive counts. The charge that the scheme *was* fraudulent does not appear from any allegation of fact but merely as the conclusion of the pleader.

An indictment couched in such general terms is insufficient. Where an offense is defined in generic terms, "it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species—it must descend to particulars." *United States* v. *Cruikshank*, 92 U. S. 542, 558. This principle, most recently reaffirmed in *Russell* v. *United States*, 369 U. S. 749, has been frequently applied by this Court and the lower courts, including the court below. See, e.g., *United States* v. *Simmons*, 96 U. S. 360; *United States* v. *Hess*, 124 U. S. 483; *Pettibone* v. *United States*, 148 U. S. 197; *Blitz* v. *United States*, 153 U. S. 308; *Keck* v. *United States*, 172 U. S. 434. *Fifth Circuit*: *United States* v. *Strauss*, 285 F. 2d 953; *Babb* v. *United States*, 218 F. 2d 538; *Campbell* v. *United States*, 167 F. 2d 451; *Hamner* v. *United States*, 134 F. 2d 592. For the application of the principle to an indictment for conspiracy to violate the Wire Fraud Statute, see *United States* v. *Mercer*, 133 F. Supp. 288 (N. D. Calif., S. Div.).[11] And cf., the model indictment for mail fraud, Fed. Rules of Crim. Proc., Appendix of Forms, Form 3, 18 U. S. C.

The indictment in *Russell* v. *United States*, for refusal to answer questions of a Congressional Committee alleged that the answers were pertinent to the subject under inquiry

[11] The principle of these cases is, of course, applicable to conspiracy indictments as well as to those for substantive offenses. In addition to the *Mercer* case, see the *Cruikshank*, *Pettibone*, and *Hamner* cases, *supra*, and *Anderson* v. *United States*, 260 F. 557 (C. A. 8).

but failed to state what that subject was. In holding the indictment defective, the Court said, at 766:

> "A cryptic form of indictment in cases of this kind requires the defendant to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture."

The present case vividly demonstrates that the same consequences flow from the "cryptic form of indictment" which the government employed here.

The chief issue under the conspiracy count was the nature of the fraudulent scheme which the defendants were charged with conspiring to execute, if indeed, it *was* a scheme to defraud (see *supra*, p. 8). Since the count failed to describe the scheme, this issue was not defined before trial. Accordingly, the defendants were foreclosed of the possibility of securing a dismissal of the count on the ground that the scheme was not, in fact, a scheme to defraud [12] and were left in the dark as to the nature of the scheme with which they would be confronted at the trial.

Furthermore, the vagueness of the indictment left the jury free to convict in the belief that the fraud consisted in the false pretenses used to lure Nazry to Juarez [13] and

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[12] As was said in *Russell*, *supra*, at 768: "It has long been recognized that there is an important corollary purpose to be served by the requirement that an indictment set out 'the specific offence, coming under the general description,' with which the defendant is charged. This purpose, as defined in *United States* v. *Cruikshank*, 92 U. S. 542, 558, is 'to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had.'"

[13] The trial court sought to supply the ingredient which the conspiracy count lacks by erroneously instructing the jury that the offences which the defendants were charged with conspiring to commit "are fully described in the first six counts of the indittment" (R. 359). As we have seen, the only false representation described in these counts is Huff's statement to Nazry.

the Court of Appeals free to affirm on the basis of false representations by Huff to Salim that Nazry had committed the robbery and was under legal arrest. And, should this Court hold the count sufficient, it could affirm by finding that the evidence supported some third theory of fraud.

The decision below squarely conflicts with *United States* v. *Mercer*, *supra*, which dismissed an indictment for conspiring to violate the Wire Fraud Statute because the indictment failed to describe the nature of the fraudulent scheme. Certiorari should therefore be granted to resolve the conflict and to decide whether the decision below sustaining the conspiracy count does not violate the principle so recently reiterated in *Russell*.

III. The conspiracy convictions are erroneous because there was no evidence that one of the two co-conspirators knew of or intended the making of any interstate or foreign telephone call for the purpose of executing the alleged scheme.

We later show (Point IV) that the evidence was insufficient to convict Nicholson of participating in any scheme or conspiracy whatever to obtain money from Salim. But even if the evidence were sufficient for that purpose and to establish that the scheme was one to defraud, reversal of Nicholson's conviction on the conspiracy count would still be required. For there is no evidence that he intended, concurred in, or even knew of the use of interstate or foreign communication by wire in the execution of the scheme.

It is well settled, by decisions of the Fifth Circuit and elsewhere, that where an accused is charged with conspiring to use the mails or the wires to defraud, it is necessary not only to prove his intent to defraud but also his intent to use the mails or wires for that purpose. *Ryan* v. *United States*, 129 F. 2d 783 (C. A. 5); *Guardalibini* v. *United*

States, 128 F. 2d 984 (C. A. 5); *Abbott* v. *United States*, 239 F. 2d 310 (C. A. 5); *Farmer* v. *United States*, 223 F. 903 (C. A. 2); *Schwartzberg* v. *United States*, 241 F. 348 (C. A. 2); *Mazurosky* v. *United States*, 100 F. 2d 958 (C. A. 9); *Morris* v. *United States*, 7 F. 2d 785 (C. A. 8); *Oliver* v. *United States*, 121 F. 2d 245 (C. A. 10); *Blue* v. *United States*, 138 F. 2d 351 (C. A. 6). As the *Ryan* case states, at 785:

> "Evidence of a scheme or conspiracy to defraud does not show a conspiracy to use the mails unlawfully, even though one of the conspirators, (without the concurrence of the other), may use the mail."

The rule of these cases is simply an application of the principle that "a conviction for conspiracy under 18 U. S. C. 371 cannot be sustained unless there is 'proof of an agreement to commit an offense against the United States.'" *Ingram* v. *United States*, 360 U. S. 672, 677-78. The offense under the Mail and Wire Fraud Statutes consists, of course, not only in devising a fraudulent scheme but in using the mails or wires, as the case may be, for its execution. Accordingly, under a conspiracy indictment, the intent of each conspirator to violate both elements of the offense must be established.[14]

There is no evidence of an intent on Nicholson's part that the wires between Juarez and El Paso be used in the execution of the alleged scheme. There was nothing inherent in the scheme which contemplated the use of a foreign phone call in its execution, particularly since the trial court's instruction (*supra*, p. 4) took Duran's calls from Juarez to Nazry in El Paso out of the case. It was

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[14] This is not the case where the indictment is for the substantive offence. In the latter situation, as the *Ryan* case points out, at 785, it is sufficient that the accused were parties to a scheme to defraud and that one of them used the mails or wires in furtherance of the scheme, even if the use was unbeknownst to and unintended by the others.

pure happenstance that the one foreign call that remains in the case (from Huff to Salim) was made from Juarez to El Paso. As far as the operation of the scheme is concerned, Huff could just as well have placed this call from El Paso.

There was, of course, no evidence that Nicholson concurred in the making of the Juarez call to Salim or that he even knew of it. The court below found no such evidence. Instead, it decided the case without reference to the established rule of law which had been thrice enunciated in its own circuit.

If, as we believe, the failure of the court below to apply this rule requires a reversal of Nicholson's conspiracy conviction, a similar reversal as to Huff is required. For, with Duran out of the case, there is no one with whom Huff can be found to have conspired.

IV. The conviction of Nicholson was erroneous because there was no evidence that he participated or conspired to participate in the alleged scheme.

Even if, contrary to what we have shown (*supra*, p. 8), the scheme on which the convictions rest had in fact been a scheme to defraud, a reversal as to Nicholson on both the substantive and the conspiracy counts would nevertheless be required because there was no evidence of his participation in the scheme.

As Judge Jones points out, App. B, *infra*, p. 34, the majority affirms Nicholson's conviction on the statement that "whenever Nazry was involved with Huff, there was Nicholson also" (App. B, *infra*, p. 30). But the majority's own summary of the evidence against Nicholson, *ibid.*, shows only that he was present in 1957 when Huff accused Nazry of the burglary; that he met Huff in the restaurant in Juarez on April 27, 1960 and was there when Salim arrived; and that he acted as chauffeur on that day.

There is, of course, not the slightest suggestion that Huff hatched any scheme to defraud Salim in 1957. Nicholson's presence during the 1957 episode therefore proves nothing except that he was a companion of Huff's. As to Nicholson's presence in the restaurant and his role as chauffeur on April 27, 1960, his testimony that he met Huff by chance in the restaurant and that he acted as chauffeur as a favor to a friend (R. 286-87) is uncontradicted. There is no other evidence against Nicholson—no evidence that he knew what Huff was up to or what was passing between Huff and Salim, and no evidence that he even knew that Huff had telephoned to Salim. Thus, there was no evidence that Nicholson was a conscious partner with Huff in a scheme of any kind. Cf. *Pereira* v. *United States*, 347 U. S. 1, 11.

Nor is there any evidence that Nicholson conspired with Huff to defraud Salim. Conspiracy requires proof of an agreement to commit an offense against the United States, *Pereira*, at 11-12. In this case, there is no proof that Nicholson even knew in what enterprise Huff was engaged, let alone that he had agreed to be a party to it. Without such knowledge, Nicholson could not be a conspirator. *United States* v. *Falcone*, 311 U. S. 205; *Direct Sales Co.* v. *United States*, 319 U. S. 703, 711; *Ingram* v. *United States*, 360 U. S. 672, 678.

In *Direct Sales*, this Court said at 711, that "the evidence of knowledge must be clear, not equivocal". In this case, such evidence is non-existent. What the majority below does, then, is what this Court cautioned against in *Direct Sales*, *ibid.*—it makes out a charge of conspiracy by piling inference upon inference. Or, to put it more bluntly, the court below sustained Nicholson's conviction on evidence establishing only that he was a friend of Huff's.

For the reasons already stated (*supra*, p. 16), a reversal as to Nicholson on the conspiracy count would require the same action as to Huff.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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HOLVEY WILLIAMS,
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of Counsel.

APPENDIX A

Judgment Below

EXTRACT FROM THE MINUTES OF APRIL 19, 1962

No. 18753

—o—

ROBERT FREDERICK HUFF and WILLIAM CONSTANTINE NICHOLSON,

versus

UNITED STATES OF AMERICA.

—o—

This cause come on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

"JONES, *Circuit Judge*, Concurs in Part and Dissents in Part."

APPENDIX B

Opinions Below

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18753

ROBERT FREDERICK HUFF and WILLIAM CONSTANTINE NICHOLSON,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

(April 19, 1962)

Before JONES, BROWN and GEWIN, *Circuit Judges.*

BROWN, *Circuit Judge*: This appeal tests the conviction of Robert Huff and William Nicholson for violation of the Wire Fraud Statute, 18 USCA § 1343, and conspiring to do so under 18 USCA § 371. Defense counsel in ten Specifications of Error has put into question every step of the proceedings leading up to the judgment of conviction—

from the indictment to the charge to the jury.[1] Finding no error in the law, and finding sufficient evidence to support the verdict, we affirm the judgment.

The events leading up to the alleged crime of 1960 began on September 17, 1957. The evidence indicated that on that date, Huff's apartment was burglarized. Cash and jewels said to value together $22,000 were alleged to have been taken. Although the record is totally lacking in any attempted explanation, Huff apparently thought it neither prudent nor advisable to notify any official of the burglary

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[1] Ten Specifications of Error were urged as follows:

"I. The trial court erred in overruling defendants' supplemental motion to dismiss the indictment.

"II. The trial court erred in overruling defendants' motion for a bill of particulars.

"III. The trial court erred in refusing defendants' requested Charge No. One (defendants' special defense).

"IV. The court erred in overruling objections in the testimony of Nazry Abraham concerning (A) telephone conversations with Antonio Duran, relating what Antonio Duran said and did out of the presence of defendants Huff and Nicholson and (B) conversations of what Mexican police officers said and did out of the presence of either defendants on trial and without substantial evidence of a conspiracy.

"V. The court erred in overruling defendants' motion for acquittal filed at the close of the government's case and renewed at the close of the case.

"VI. The court erred in overruling defendants' motion for acquittal as to the conspiracy count.

"VII. The trial court erred in not giving defendants' Special Requested Charge No. Four.

"VIII. The prosecutor's question to a defense witness on cross examination was so highly prejudicial and improper that it constituted plain error.

"IX. The court erred in overruling defendants' objections to the testimony of Salim Abraham as to what he said and did, out of the presence of the defendants.

"X. The trial court erred in refusing defendants' Special Requested Charge No. Two."

other than the manager of the apartments where he lived. Rather, the course of action which Huff chose to follow was to call one of his gambling companions, Nazry Abraham, who worked at a furniture store belonging to his father, Salim Abraham.[2] Huff then persuaded Nazry to deliver an air conditioner to his apartment. But when Nazry arrived at Huff's apartment and found Huff and Nicholson waiting, he soon learned that they were not interested in the air conditioner. Instead he was taken into the kitchen and accused of taking Huff's money and jewels. After stoutly denying any part in any burglary, he was released in a couple of hours after he promised to do all he could to help Huff find and regain possession of the jewels. Shortly thereafter Nazry received a call from "Tony."[3] Nothing further was done. From all that appeared the matter was closed. Nazry had no occasion to, nor did he, discuss the matter further with either Huff or Nicholson or anyone else until almost three years later.

On April 22, 1960, and apparently out of the blue, Nazry received a telephone call from Duran, then in Mexico, in regard to jewelry which Duran said belonged to, and was stolen from, Huff. In as many days Nazry received four additional international long distance calls from Duran. After each one, Nazry promptly called Huff to relay to him the conversation had with Duran. Also each time Huff attempted to persuade Nazry to go to Juarez, Mexico—just across the border—to meet Duran and see the jewels. Nazry testified that after Huff described some of the jewelry over the telephone, "he asked me to please act more or less like his agent and retrieve those so-called jewelry." Each time

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[2] To facilitate discussion and for purposes of clarity, we use the first names of father and son.

[3] "Tony" was Antonio Duran who was a co-defendant. He was not under arrest and said to be in Mexico beyond the jurisdiction of the Court, and therefore not on trial.

Nazry refused until finally on April 26, 1960, he consented to go to Juarez to see the jewelry. In a matter of minutes after he reached the designated rendezvous at the El Taurino Club, several men surrounded him with pistols and told him he was under arrest. These men were Mexican Federal Judicial Police officers.

Instead of being taken to the jail at Juarez, Nazry was driven some 30 or 40 miles to another town in Mexico known as Guadalupe. He was taken to what one witness described as a downtown tenement house, and which Nazry himself didn't know whether it was a house or a jail. In any event he was forcibly detained there. He testified that once inside, the men shouted at him, drew their pistols, and forced him to sign a confession. The substance of the confession was that he had in fact robbed Huff's apartment (in 1957). Nazry requested that the officers contact his father and Huff which they agreed to do.

Meanwhile Salim spent a sleepless night. His daughter-in-law called late to inquire about Nazry and to tell Salim that Nazry had not come home. Salim then spent the rest of the night looking for Nazry and checking the police and sheriff's departments, and the jails in both El Paso and Juarez. Finally, he received a call from Huff at 8:45 on the morning of April 27, 1960. Huff said he was in Juarez at the La Sevillano Restaurant and that he was waiting there to talk with Salim about Nazry.

When Salim arrived in Juarez, Huff informed him that Nazry was in the custody of the Mexican Federal Police, and that Nazry had robbed his apartment three years ago. Huff demanded $22,000 for Nazry's release. By this time the Mexican police who knew of the scheme began to gather around and, according to Salim, they suggested that Salim "pay the man [Huff] and forget it." But Salim refused to make any deal until he saw his son.

Then they went outside and got into Nicholson's car and Nicholson drove them to Guadalupe. When they arrived at about 11:00 a. m. at the place where Nazry was being held, Huff in the presence of Salim asked Nazry if he had robbed Huff's apartment, and Nazry said yes—later explained by Nazry to be because of fear. When Salim saw that his son was all right, he was ready to talk business with Huff. By further discussion he was able to reduce Huff's demand from $22,000 to $12,000. Then Nicholson drove Huff and Salim to El Paso where Salim went to the bank and borrowed $15,000—$12,000 with which to satisfy Huff's demand and $3,000 for extra safety in case some of the others decided they wanted money also. Nicholson knew of the purpose of the trip back to El Paso and let Salim off at the bank.

Meanwhile that afternoon, a Mexican Federal Police Officer took Nazry to a little town on the border between Mexico and United States known as Caseta. Presumably this was the place where his "purchased" release was to take place. After they waited awhile and nothing developed, they took him to the Juarez jail at about 5:00 p. m., from which he was released later that evening.

When Huff and Nicholson let Salim out in El Paso, he told both of them to go back to the La Sevillana Restaurant, and he would return within an hour with the money. When Huff and Nicholson returned, they were arrested by the Juarez Secret Police, and held for four months before their release. Arrested also were the Mexican Federal Judicial Police Officers.

After their return from Mexico, Huff and Nicholson were indicted and tried for the Federal crimes charged here. After both were found guilty by a jury, Huff was sentenced to two years on each of the six substantive

counts to run concurrently, and five years on the seventh

"1. That prior to April 20, 1960, and continuing to on or about April 28, 1960, * * * HUFF * * * NICHOLSON and ANTONIO DURAN devised * * * a scheme and article to defraud Salim Abraham and to obtain money by means of false and fraudulent pretenses; * * * well knowing at the time that the pretenses * * * would be false when made: That on various occasions, by telephone from Juarez, Chihuahua, Mexico, to El Paso, Texas, * * * HUFF, * * * NICHOLSON and ANTONIO DURAN attempted to induce Nazry Abraham to go into Juarez, Chihuahua, Mexico, for the purpose of assisting the said * * * HUFF, * * * NICHOLSON and ANTONIO DURAN to recover jewelry taken in an alleged burglary of * * * HUFF's apartment in El Paso County, Texas, three years previously, whereas in truth and in fact the said * * * HUFF, * * * NICHOLSON and * * * ANTONIO DURAN had conspired to obtain the arrest of * * * Nazry Abraham by Mexican authorities upon his entry into Mexico, for the purpose of representing to Salim Abraham, father of Nazry Abraham, that upon payment of $22,000.00 they would assist in the release of the said Nazry Abraham.

"2. On the 22nd day of April, 1960, * * * the defendants, * * * HUFF, * * * NICHOLSON, and ANTONIO DURAN, for the purpose of executing the aforesaid scheme and artifice, * * * caused sounds to be transmitted * * * from Juarez, Chihuahua, Mexico, to the City of El Paso, El Paso County, Texas, * * * by telephone, to Nazry Abraham."

The second through the sixth counts were the same as the first count shown above except that different telephone calls were alleged. The telephone call in count six was from Huff to Salim.

"Seventh Count. That commencing on or about April 20, 1960, and continuing thereafter until on or about April 28, 1960, * * * HUFF, * * * NICHOLSON and ANTONIO DURAN, having devised * * * a scheme and artifice to defraud Salim Abraham, and to obtain money by means of false and fraudulent pretenses, * * * unlawfully conspired, confederated and agreed together to transmit * * * and to cause sounds to be transmitted, by means of wire * * * from Juarez, Chihuahua, Mexico, to El Paso, Texas, for the purpose of executing such scheme * * * in violation of Section 1343 of Title 18, United States Code, and to effect the object of their said conspiracy they did the following acts:

"1. On * * * April 22, 1960, * * * Antonio Durán, at Juarez; * * * called Nazry * * * at El Paso, Texas, by telephone.

"2. On * * * April 22, 1960, in the afternoon, ANTONIO DURAN, at Juarez, * * * called Nazry * * * at El Paso * * *.

(conspiracy) count to run consecutively with the sentence on the first six counts. Nicholson's sentence was five years on each of the seven counts to run concurrently. It is from that judgment that this appeal was taken.

"3. On * * * April 23, 1960, ANTONIO DURAN, at Juarez * * * called Nazry * * * at El Paso * * *.

"4. On * * * April 24, 1960, and for several consecutive days thereafter, * * * HUFF and * * * NICHOLSON met with other persons * * * at the Sevillana Resturant in Juarez * * *.

"5. On * * * April 25, 1960, ANTONIO DURAN, at Juarez * * * called Nazry * * * at El Paso * * *.

"6. On * * * April 26, 1960, ANTONIO DURAN, at Juarez, * * * called Nazry * * * at El Paso * * *.

"7. On * * * April 26, 1960, ANTONIO DURAN and Nazry * * * had a conversation at Club Taurino, Juarez, Chihuahua, Mexico.

"8. On * * * April 26, 1960, ANTONIO DURAN and Nazry, * * * were arrested in Juarez, * * * and placed in a jail at Guadalupe * * *.

"9. On * * * April 27, 1960, * * * HUFF and * * * Nicholson, at Juarez, * * * called Salim * * * at El Paso, Texas, by telephone.

"10. On * * * April 27, 1960, * * * at the Seveillana Restaurant, in Juarez, * * * HUFF and * * * NICHOLSON had a conversation with Salim * * *.

"11. On * * * April 27, 1960, * * * HUFF and * * * NICHOLSON drove Salim * * * by automobile to a jail in Guadalupe * * *.

"12. On * * * April 27, 1960, * * * HUFF and Salim * * * had a conversation at a jail in Guadalupe * * *.

"13. On * * * April 27, 1960, * * * HUFF and * * * NICHOLSON drove Salim * * * by automobile from * * * Guadalupe, * * *, Mexico, to Fabens, Texas, then to the State National Bank in El Paso, Texas.

"14. On * * * April 27, 1960, Nazry * * * was removed from a jail at Guadalupe * * * and taken to a point * * * near Fabens, Texas.

"15. On * * * April 27, 1960, * * * HUFF and * * * NICHOLSON returned by automobile from El Paso, Texas, to Juarez, * * *.

"16. At the time and place above alleged, * * * HUFF, * * * NICHOLSON and ANTONIO DURAN devised the scheme alleged in the preceding counts of this indictment."

Appendix B—Opinions Below

Appellants' motions for acquittal raised the question of the sufficiency of the evidence.[5] However, the major point woven into most of the other points of error is that of the legal sufficiency of the indictment.[6] It is asserted that fraud or deceit is not alleged in the indictment. Rather, it is claimed, the scheme alleged was to extort money. That point is also raised in the argument on the sufficiency of the evidence by practically admitting all that took place, but saying that while such evidence may amount to extortion or coercion, there is no fraud shown and therefore conviction under 18 USCA § 1343 cannot stand. Great stress is laid on *Fasulo* v. *United States*, 1926, 272 U. S. 620, 47 S. Ct. 200, 71 L. Ed. 443, which held that extortion as such does not amount to a scheme to defraud under the Mail Fraud Statute, 18 USCA § 1341. But that case itself demonstrates that it is not controlling here. Referring to a prior case[7] sustaining a mail fraud charge, the Court observed that "* * * there were involved trickery and deceit as well as threat.". It was the presence of threats alone which the Court regarded as distinctive and decisive. For the Court commented that "if threats to kill or injure unless money is forthcoming do not constitute a scheme to defraud within the statute, there is none in this case. The only means employed by petitioner and his co-conspirators to obtain the money demanded was the coercion of fear." 272 U. S. 620, 626, 628.

While the actions of Huff and Nicholson here may or may not have amounted to extortion, coercion, threats or kidnapping, they were not simply that. They were much more since a fraudulent scheme of implied or expressed misrepresentations could also be found in these actions. *Muench* v. *United States*, 8 Cir., 1938, 96 F. 2d 332. In

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[5] See Specifications of Error Nos. V and VI in footnote 1, supra.

[6] See Specification of Error No. I.

[7] Weeber v. United States, C. C. D. Col., 1894, 62 Fed. 740.

other words, for purposes of the Wire Fraud Statute fraud and extortion are not mutually exclusive. The mere fact that extortion may constitute one aspect of the transaction does not insulate the fraudulent representations and plan from prosecution as a scheme to defraud.

In the present case, one credited by the jury, the whole scheme from beginning to end amounted to trickery and deceit. The scheme revolved around luring the victim out of the United States and into Mexico. This was carried out as to Nazry by representing that certain jewels alleged to have been stolen had been found. Indeed, there was evidence from which the jury could find that the jewels had not been found, if they were ever stolen, and if they belonged to Huff in the first place. Huff also told Nazry that he wanted Nazry to go to Mexico as his agent and see the jewels, and that he would pay a nice price to get them back. Huff explained that he was too busy and too sick to go himself. The jury could find from the evidence before it that none of these representations were true.

Huff told Salim that Nazry had robbed his apartment, and he indicated that Nazry was under a legal arrest based on a legal complaint and that Huff could obtain his release for $22,000. The jury could find here also that some or all of these representations were untrue.

There is no requirement that the victim be actually deceived, but only that there be a scheme to defraud, and that the telephone be used as a step in the execution of the scheme.[8] Nor is it essential that the scheme be successful.

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[8] "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire * * * in interstate or foreign commerce, any * * * sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both." 18 USCA § 1343.

The record in this case is more than ample to show that there was a scheme to defraud and that at least one jurisdictional telephone call was made in furtherance of that scheme.

We must therefore agree with the Trial Court that the indictment was sufficient as a matter of law and should not have been dismissed. The indictment was substantially in the language of the statute with sufficient particularization to inform the defendants of the nature of the charges against them and to enable them to prepare their defense. In short, the indictment spelled out an offense under 18 USCA § 1343.

The motions for acquittal were also properly denied. Even if the evidence is excluded as to what Duran did and said, taking out the first five counts, it is not disputed that Huff called Salim from Juarez to El Paso on April 27, 1960 —the subject of the sixth count in the indictment and overt act No. 9 in the conspiracy count. And since the sentences for the first six counts for both defendants were to run concurrently, we need only find sufficient evidence to support the conviction for one of the counts to affirm the judgments. *Perez* v. *United States*, 5 Cir., 1961, 297 F. 2d 12; *Kahm* v. *United States*, 5 Cir., 1962, — F. 2d — [No. 18855, February 9, 1962]; *Danziger* v. *United States*, 9 Cir., 1947, 161 F. 2d 299, cert. denied, 332 U. S. 769, 68 S. Ct. 81, 92 L. Ed. 354. So far as the jurisdictional call was concerned, Huff's consecutive sentence on the conspiracy count was substantiated by the very same call specified as one of the overt acts:

That such call was a step in the execution of the scheme was not disputed either. Salim testified that Huff said "Come over here, I have your son here, come alone, I want to talk with you about him." No one undertook to dispute or deny this conversation. Indeed, Huff himself admitted to the American Consulate in Juarez that he called Salim about Nazry's being in jail.

As to Nicholson, counsel attempts to argue that there is no evidence to connect him with any conspiracy.[9] However, to convict of conspiracy, it is only necessary to prove knowledge of the conspiracy, and that some act in furtherance of it was intentionally done by the defendant charged. *Duke* v. *United States*, 5 Cir., 1956, 233 F. 2d 897, 901. While mere presence is not sufficient to convict, the jury was entitled to find here, as it did, that it was more than mere coincidence or accident that Nicholson was present almost every time any part of the scheme took place. Indeed, from 1957 to 1960 whenever Nazry was involved with Huff, there was Nicholson also. Nicholson was with Huff when Nazry was first detained in 1957 and accused of burglarizing Huff's apartment. He was at the restaurant in Juarez when Huff called Salim. He was present when Salim arrived. His car—with him as the driver—was used to transport Huff and Salim from Juarez to Guadalupe to see Nazry, and then to El Paso for Salim to get the money. He then drove Huff back to Juarez where he knew Huff expected to get the money from Salim. They were together there when they were arrested by the Mexican officials. It was for th jury to say whether Nicholson's presence and actions on each of these occasions were innocent coincidences, on the one hand, or culpable, active or willing, participation in a plan by which Huff was to get money out of Salim on the other hand. There can be no doubt about there being enough evidence of Nicholson's part in the conspiracy and the scheme to defraud to go to the jury.

In Specification of Error No. IV, see Note 1, it is asserted that the Court erred in overruling objection to evidence as to what Antonio Duran and the Mexican police officers did and said out of the presence of Huff and Nicholson. It must be pointed out that the evidence involving

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[9] This point is also raised in Specification of Error No. VII. See note 1, supra.

Duran was severely limited when it came in, and the charge instructed the jury not to consider it at all. It may be that this exclusionary charge went too far. For the evidence introduced was not hearsay. What Duran said to Nazry, and and which Nazry then repeated to Huff, was not offered to prove the truth of such out of court declarations. It was to prove the words as an operative, verbal fact. *Ward* v. *United States*, 5 Cir., 1961, 296 F. 2d 898; *Safeway Stores, Inc.* v. *Combs*, 5 Cir., 1960, 273 F. 2d 295; *United States* v. *Gavegan*, 5 Cir., 1960, 280 F. 2d 319. Since the required jurisdictional message can be found in Count six, and in overt act No. 9 as to the conspiracy count, without any of the above evidence, we see no need to, and therefore do not, reach the question as framed by the appellants. We do hold, however, that the action of receiving, then excluding, the evidence did not constitute an error on the ground that the evidence was of such a prejudicial nature as to require reversal.[10] Even with the testimony involving Duran excluded, there would still be evidence of Huff's trying to persuade Nazry to go to Mexico to look at some jewels. Without regard to whether the handling of it was proper or improper, we cannot hold here that receipt and exclusion of such cumulative evidence would require a reversal. Since the evidence was positively excluded by the Court in its charge, the only thing left is whether it was of such an inflammatory nature that the effect of it could not be eradicated. Certainly evidence of the calls from Duran was no more prejudicial than Huff's conversation with Nazry. Assuming, without deciding, the applicability of them, nothing in any of the cases cited by defendants would require a reversal.[11] We likewise hold

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[10] See 4 Barron & Holtzoff, Federal Practice & Procedure, § 2578.

[11] United States v. Ganey, 2 Cir., 1951, 187 F. 2d 541; Panci v. United States, 5 Cir., 1958, 256 F. 2d 308; Mora v. United States, 5 Cir., 1951, 190 F. 2d 749; Stanley v. United States, 6 Cir., 1957, 245 F. 2d 427; Handford v. United States, 5 Cir., 1957, 249 F. 2d 295.

that the handling of the evidence concerning actions of the Mexican police officers does not require a reversal of this case. Similarly, we regard the objection to the testimony of Salim Abraham set out in Specification of Error No. IX as being without merit. As pointed out above, with respect to Duran's statements to Nazry, this testimony was not hearsay. It was not an effort to attribute out of court declarations of one not a conspirator as an admission against a defendant to prove the truth of the words spoken. It was testimony of words spoken as operative, verbal facts or actions done by others in the presence of the witness who testified of his own direct knowledge as to what he heard and saw, and as to which he was subject to cross examination. And, if the contention means more than an objection against hearsay so that it literally asserts that no evidence is admissible save that concerning events occurring in the presence of a defendant, it is obviously unfounded. Of course relevancy is required, but on that score there can be no real question. The scheme included coercive actions by Mexican policemen and the luring of Nazry and Salim in to Mexico. This testimony from witnesses having personal knowledge bore on those and other elements of the plan to get money from Salim.

As to the overruling of the motion for a Bill of Particulars complained of in Specification of Error No. II, we observe that F. R. Crim. P. 7.(f) makes the granting of such a motion discretionary with the Trial Judge. The issue before us, then, is not whether the Trial Judge should or should not have ordered the filing of a Bill of Particulars, but rather whether his action amounted to an abuse of discretion. On the record before us, we find no such abuse of discretion. The indictment, read in its entirety, offers sufficient particularity to enable the defendants to prepare for their defense and to protect them from a second prosecution for the same offense. While a large part of the

appellants' argument is devoted to the proposition that they might have been surprised at the trial, no surprise was ever claimed by them at the trial. The overt acts specified considerable detail about times, places, telephone calls, persons and other actions. If the trial produced surprise, as distinguished from disappointment or damaging evidence, it was never revealed in the record.

Specification of Error No. VIII claims that the Government's questioning of a defense witness on cross-examination was so highly prejudicial and improper that it constituted plain error since it implied that the witness was a narcotics addict.[12] We do not agree.

This line of questioning by the Government was apparently an attempt to impeach the defense witness. Its prejudicial effect is an afterthought. For none of the attorneys present in the courtroom representing the defendants thought this line of questioning at the time was so highly inflammatory or even improper enough to make an objection. There is no showing that the prosecutor, in propounding the question, knew that the witness would make a denial. For that matter, the answer, equivocal as it was, in

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[12] The incident occurred as follows:

"Q. Now, Mr. Arrendondo, isn't it true, or is it true, that in January, 1959, you were certified as a narcotics addict?

"A. Well, not exactly because I am not a narcotic, I am not an addict, and I can prove that, now.

"Q. Now, as of January, 1959, you were taken to the hospital in Juarez, Mexico, is that not correct?

"A. Not exactly to the hospital, but to the health department.

"Q. And in January of 1959 they certified you as an addict there, is that correct?

"A. No.

"Q. What did they do?

"A. I don't know exactly; but I have some papers here from Mr. Flores [a Mexican Judge] where it is stated that I am not an addict, * * *."

effect was at least an affirmation that there was a factual basis for asking the question.

Specification of Error Nos. III, X and VII complain of the refusal by the Trial Judge of defendants' Special Requested Charges Nos. 1, 2, and 4. We find no error in the refusal of the requested charges. Requested Charge No. 1 in effect instructed the jury that if the defendants thought Nazry had stolen the jewelry in 1957, it would not be a violation of 18 USCA § 1343 to attempt to recover the property. The law certainly does not countenance the sort of self-help described in the indictment and credited by the jury, especially when it was coupled with a plan to obtain, not the jewels of unknown value, but a huge sum of cash. Requested Charges Nos. 2 and 4, insofar as they correctly reflect the law, were adequately given by the Court in its careful and complete charge.

None of the asserted grounds is supported as to either appellant. All of the defendants' legal rights were protected. As is so frequent, it was for the jury to decide the truth. The truth was declared by the verdict. The verdict was guilty. There it ends.

AFFIRMED.

JONES, *Circuit Judge*, concurring in part and dissenting in part:

I join with the majority in affirming the conviction of the appellant Huff. As to sustaining the conviction of Nicholson, I dissent.

Although the majority pay lip service to the doctrine that mere presence is not sufficient to convict, it seems to me that they affirm the conviction on the statement that "whenever Nazry was involved with Huff, there was Nicholson also." The burden was on the United States to prove the guilt of Nicholson beyond a reasonable doubt.

The only evidence to involve him in conspiracy is that he was present. There is no evidence that he was a participant or that he even knew what Huff and the others were doing. I think we should reverse as to Nicholson and direct either an acquittal or a new trial.

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No. 141

In the Supreme Court of the United States

October Term, 1962

ROBERT FRANKLIN [illegible] AND WILLIAM CONSERVATIVE
[illegible], PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

[illegible]
Solicitor General,
[illegible]
Assistant Attorney General,
[illegible]
[illegible],
Attorneys,
Department of Justice, Washington 25, D.C.

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662122—62

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 441

ROBERT FREDERICK HUFF AND WILLIAM CONSTANTINE NICHOLSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority (Pet. 20–34) and dissenting (Pet. 34–35) opinions of the court of appeals are reported at 301 F. 2d 760.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1962. A petition for rehearing was denied on July 23, 1962. On August 7, 1962, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including September 21, 1962, and the petition was filed on September 19,

1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment sufficiently described a fraudulent scheme so as to charge an offense under the wire fraud statute (18 U.S.C. 1343), and, if so, whether allegations that the scheme included a demand for money for the release of a person arrested by Mexican authorities removed it from the scope of the statute.

2. Whether the evidence was sufficient to support the convictions.

STATUTE INVOLVED

Section 1343 of Title 18 of the United States Code provides as follows:

> § 1343. Fraud by wire, radio, or television.
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits, or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioners were indicted in the Western District of Texas and charged in seven counts with six substantive violations of the wire fraud statute as well as

a conspiracy to violate that statute (R. 1–7).[1] The jury convicted petitioners on all counts (R. 373). Huff was sentenced to seven years' imprisonment—a concurrent sentence of two years on each substantive count to run consecutively to a sentence of five years on the conspiracy count. Nicholson was sentenced to five years' imprisonment on each count to run concurrently (R. 377–380). The facts may be summarized as follows:

In September 1957, petitioners had accused Nazry Abraham of burglarizing petitioner Huff's apartment in El Paso, Texas, and Nazry had denied the accusation. Neither the accusation nor the alleged crime was reported to the local police (R. 23–25, 153, 162). From that time until April 22, 1960, Nazry did not see, speak to or have any contact with either petitioner about the alleged burglary or any other matter (R. 26).

On April 22, 23, 25 and 26, 1960, Antonio Duran telephoned Nazry five times from Juarez, Mexico, to El Paso, Texas, and informed him that a man there possessed jewelry belonging to Huff. Nazry relayed each of these messages to Huff who sought to persuade Nazry to go to Juarez on his behalf, stating that he himself could not go because of illness. On April 26, 1960, Nazry, yielding to Huff's importunities, did agree to meet Duran at a Juarez nightclub known as "El Taurino" (R. 22–23, 26–30). When Nazry met Duran at the nightclub, he was arrested, placed in

[1] Antonio Duran, a Mexican national, was also charged in the indictment. He was not apprehended (R. 20, 33).

an automobile and driven to Guadalupe (R. 33–37). There he was coerced into signing a confession that he had conspired with Duran to break into Huff's apartment in 1957 (R. 38–39). Nazry then pleaded with his captors for permission to see his father, Salim Abraham (R. 40).

On April 27, 1960, at about 8:45 a.m., Salim Abraham, in El Paso, received a telephone call from Huff in Juarez in which the latter said, "Come over here, I have your son here, come alone, I want to talk with you about him." Huff directed Salim to go to the La Sevillana Restaurant in Juarez, Mexico (R. 121–122). Ten minutes later Salim met Huff at the restaurant. Huff accused Nazry of a 1957 theft from his apartment and demanded $22,000 for Nazry's release. Several men came up to the table where they sat, including a man who represented himself to be a Mexican federal agent, and advised Salim to agree to Huff's demand. When Salim refused to pay unless he saw Nazry, he was directed to petitioner Nicholson's automobile. At the car he asked Nicholson, "what is your business with us?" Nicholson replied that he was the driver. Salim, Huff, Nicholson and three Mexicans then got in Nicholson's automobile (R. 125–128, 98–101, 154–156). They drove to Guadalupe where Salim was permitted to speak to his son only in English and in Huff's presence. At the meeting, Huff grabbed Nazry's arm, asked him if he had committed the "robbery" and Nazry said that he had (R. 41, 129).

Salim offered to sign a note for the money requested but Huff demanded cash. When Huff reduced his

demand to $12,000, Salim asked to be taken to El Paso so that he could try to raise the money. Nicholson then drove Huff and Salim at seventy-five to eighty miles an hour to an El Paso bank. At the bank, Salim told Huff and Nicholson "to go back to the La Seviliana Restaurant and wait for me, I will return there in about an hour with the money" (R. 130, 131, 337).

Huff and Nicholson returned to Juarez where they were accosted by two sons-in-law of Salim and by Mexican police. When asked for Nazry's location, Huff replied that everything had been settled and was all right. Petitioners were then arrested. When Salim returned to Juarez, they were in the custody of the police (R. 103–106, 133–137). Two Mexican federal agents who had participated in Nazry's seizure were also arrested (R. 138).

Petitioners had been seen in the La Sevillana Restaurant on four or five occasions prior to Nazry's arrest talking with Mexican government officials (R. 173–174).

On the day following his arrest, in a statement to a State Department officer, Huff said that he had told a Mexican taxicab driver, whose name he did not know, to notify him if Nazry was ever in trouble in Juarez, that the cab driver had informed him that Nazry had been arrested by Mexican authorities and that Huff had called Salim to inform him that his son was in jail (R. 160–161). When the officer referred to a statement that Salim had given to the Mexican police, Huff stated that Nazry had taken items worth $22,000 from his apartment, that Huff had

signed a complaint in a Mexican restaurant accusing Nazry of this alleged crime, and that he had gone to the place where Nazry was being confined to seek restitution for the goods stolen from his apartment (R. 162, 165).

Petitioners introduced evidence showing that Huff's apartment had been burglarized in September 1957 (R. 243, 282), that Nazry had plotted the burglary (R. 190–195) and had rented a safe deposit box shortly after the alleged burglary (R. 218–219), and that a ring from the claimed theft had been found in Mexico (R. 255, 259). They also introduced a document signed by Huff accusing Nazry of the 1957 alleged burglary (R. 165). A Mexican lawyer testified that this document would have been sufficient to initiate a criminal investigation by the police (R. 224–228).

Petitioner Nicholson testified that he was in the restaurant on April 27 when Huff met Salim. He admitted that he drove them to Guadalupe and to El Paso and that he then returned to Juarez. He claimed that his two trips to Juarez on that day were solely for the purpose of obtaining a haircut and that he had chauffeured Huff and Salim merely as a favor to Huff (R. 286–289). He also testified that the ring found in Mexico had been in Huff's home prior to the alleged burglary (R. 281–284).

ARGUMENT

1. The substantive offense proscribed by the wire fraud statute (18 U.S.C. 1343, *supra*, p. 2), like its companion mail fraud statute, consists of two essential elements: (1) the devising of a scheme to defraud

or to obtain money by false pretenses, and (2) the use of a communications facility (here transmittal of sounds in interstate or foreign commerce by wire communication) for the purpose of executing such a scheme. See *Pereira* v. *United States*, 347 U.S. 1, 8. Counts 1 through 6 of the indictment, the substantive counts, alleged these elements. These counts charged, in the language of the statute, that the petitioners together with Antonio Durán devised a scheme to defraud Salim Abraham and to obtain money by means of false representations and that, in execution of the scheme, the defendants caused a telephone call to be made. Each of these counts particularized that the petitioners attempted to lure Nazry Abraham into Mexico by representing to him that he should assist them to recover jewelry taken in an alleged 1957 burglary of Huff's apartment when in truth the petitioners had conspired with Mexican officials to arrest Nazry as soon as he entered Mexico in order to demand $22,000 from Salim Abraham for his son's release (R. 1–5).

It is true that the only false representation alleged was made to Nazry and not to Salim. However, contrary to petitioner's contention, the indictment need not allege nor must the evidence show that false statements were made to the person defrauded. Indeed, there is no necessity that there be any false representations where the indictment is founded on a scheme which, like this one, is fraudulent in its entirety. *Graham* v. *United States*, 120 F. 2d 543, 544 (C.A. 10); *United States* v. *Sylvanus*, 192 F. 2d 96, 105–106 (C.A. 7), certiorari denied, 342 U.S. 943; *Gregory* v. *United States*, 253 F. 2d 104, 109 (C.A. 5);

United States v. *Fromen*, 265 F. 2d 702, 704–705 (C.A. 2), certiorari denied, 360 U.S. 909. The statute itself specifically makes it a crime to use wire communications to execute "any scheme or artifice to defraud, *or* for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * *" (Emphasis added).[2]

That the indictment identified the scheme sufficiently to enable petitioners to prepare their defense is made manifest by the evidence produced in petitioners' defense as well as by the lack of any claim during the trial that they were surprised by the prosecution's case.

The conspiracy count, count 7, also adequately described the fraudulent scheme which was the object of the conspiracy. It is well established that an indictment for conspiracy to commit an offense need not al-

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[2] The sixth count, involving the call from Huff to Salim, is sufficient to support Huff's sentence on the substantive counts, and conviction on either this sixth count or the conspiracy count supports the sentence as to Nicholson (see Pet. App. 29). The trial court, in giving instructions proposed by the petitioners (R. 371–372), instructed the jury that it was not to "consider any testimony that the defendant Antonio Duran may have said or done in connection with the defendants," and went on to say that the "membership of a defendant or any other person in a conspiracy must be established by evidence beyond a reasonable doubt as to his own conduct, what he himself said or did" (R. 360). Read in the light of the instructions as a whole and the fact that the judge submitted the six substantive counts to the jury, the instruction cannot be understood as directing the jury to disregard Nazry's testimony of the telephone calls from Duran. Rather it served to emphasize to the jury the fact that the membership of either petitioner in the conspiracy had to be based on testimony relating directly to that petitioner.

lege the objectives of the conspiracy in such detail as is required to charge a substantive violation. See *Wong Tai* v. *United States*, 273 U.S. 77; *Thornton* v. *United States*, 271 U.S. 414, 423. As this Court observed in *Williamson* v. *United States*, 207 U.S. 425, 447, in a conspiracy indictment, "the conspiracy is the gist of the crime, and certainty, to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is requisite in stating the object of the conspiracy."

The conspiracy count alleged (R. 5–6):

> That commencing on or about April 20, 1960, and continuing thereafter until on or about April 28, 1960, in El Paso County, Texas, within the El Paso Division of the Western District of Texas, ROBERT FREDERICK HUFF, WILLIAM CONSTANTINE NICHOLSON and ANTONIO DURAN, having devised and having intended to devise a scheme and artifice to defraud Salim Abraham, and to obtain money by means of false and fraudulent pretenses, representations and promises, unlawfully conspired, confederated and agreed together to transmit sounds and to cause sounds to be transmitted, by means of wire communication in foreign commerce, from Juarez, Chihuahua, Mexico, to El Paso, Texas, for the purpose of executing such scheme and artifice and attempting so to do, in violation of Section 1343 of Title 18, United States Code, and to effect the object of their said conspiracy they did the following acts:

The indictment then enumerates sixteen overt acts that were committed to effect the object of the conspiracy (R. 6–7). Coming as it does after the six sub-

stantive offenses, the conspiracy count spelled out enough to notify petitioners of the crime which they were called upon to answer. Petitioners' claim that this count should have descended to more particulars seems hollow in the absence of any showing that they were misled.[3]

Petitioners' contention that the substantive counts of the indictment charged a scheme to extort rather than to defraud is without merit. It is true that if an indictment charges only a scheme to obtain money by means of intimidation and does not charge anything in the nature of fraud or deceit, the wire fraud statute would not be violated. *Fasulo* v. *United States*, 272 U.S. 620. But here the indictment alleged a scheme to defraud and to obtain money by false pretenses and alleged that false representations were made to lure Nazry into Mexico. The allegations that petitioners caused the arrest of Nazry for the purpose of obtaining $22,000 from his father were not repugnant to the fraud charged. Petitioners are not entitled to immunity in their use of fraudulent means because the complete execution of their scheme also involved other wrongful acts which may constitute

[3] Petitioners argue (Pet. 14) that the decision below conflicts with *United States* v. *Mercer*, 133 F. Supp. 288 (N.D. Calif.). Beside the fact that *Mercer* is a district court case, the conspiracy indictment which was there found insufficient included no particulars whatsoever. It was drafted in the words of the statute and did not give the dates of the offense, the names of the persons who were the objects of the scheme, or the place of origination or receipt of the unlawful wire communications. The conspiracy count under attack by petitioners here includes all these particulars.

intimidation." *Muench* v. *United States*, 96 F. 2d 332 (C.A. 8).

2. The sufficiency of the evidence presents no issue warranting further review.

The evidence adduced showed a scheme to defraud. The false representation to Nazry that he should go to Juarez to attempt to recover Huff's jewelry was in itself sufficient to prove that a scheme to defraud had been devised. As pointed out above, the statute does not require that false representations be made to the person from whom the money is sought but rather it condemns the devising of any scheme to defraud where wire communications are used in the execution thereof. In addition to this false representation, the jury could have found, as a component part of the scheme, that false representations were made to Salim that his son had burglarized Huff's apartment and that his son had been legally arrested.[5]

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[4] The court in its instruction cautioned the jury (R. 349):

"Now, the defendants are not on trial for extortion, and you will not consider or be influenced by evidence, if any, that there was any extortion. Unless you find and believe beyond a reasonable doubt that there was a scheme formed by the defendants and each of them to defraud by deception and false representations, you will acquit the defendants and each of them as you may find the facts to be."

[5] The trial judge did not, as petitioners contend (Pet. 10), refuse to instruct the jury that it should acquit if it found true Huff's accusation that Nazry had burglarized his apartment. Petitioners never requested such an instruction. They proposed that the court charge the jury: (1) that it is not a violation of the wire fraud statute to attempt to recoup money "due you by the ones alleged to have been defrauded" and therefore the jury should acquit if they found that Nazry Abraham burglarized Huff's apartment; and (2) that it was the government's

These representations did not vary the proof from the indictment as they were fairly embraced within the scheme charged. Nor does the fact that the victim may not actually have been deceived relieve petitioners of their liability. A fraudulent scheme is punishable even if not successful.

The jury was justified in concluding that Nicholson aided and abetted the scheme and was a participant in the conspiracy. He participated with Huff in the 1957 accusation that Nazry had burglarized the apartment and was present in more than a casual capacity at every important step thereafter. His own testimony puts him in the Juarez restaurant when Huff demanded $22,000 from Salim Abraham for his son's release. He drove Salim, Huff and three Mexicans to Guadalupe to enable Salim to see his son, telling Salim, when he asked "what is your business with us?" that he was the driver. He then drove Huff and Salim at high speeds to the El Paso bank to enable Salim to withdraw the money sought. He returned to Juarez after Salim told him and Huff that he would meet them there "with the money." Upon this evidence the jury was properly allowed to find him to be a knowing participant and not a mere spectator.

Petitioners argue further (Pet. 14–16) that the conspiracy convictions were erroneous in that there was

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burden to prove that no burglary had occurred and therefore the jury should acquit if they had a reasonable doubt as to whether a burglary had occurred (R. 367–368). An instruction to acquit if the jury found that Nazry burglarized the apartment would have been erroneous since this fact alone would not have justified the fraudulent conduct of petitioners.

no evidence that Nicholson knew of or intended the making of any interstate or foreign telephone call for the purpose of executing the alleged scheme; that to make out the conspiracy charged, the proof must show that both parties agreed to make such use of wire communications; and that the failure of proof as to Nicholson precludes conviction since there could be no agreement.

Contrary to petitioners' contentions, there is ample evidence from which the jury could have found that it was part of the conspiracy that a telephone call between Juarez, Mexico, and El Paso, Texas, would be made in order to execute the scheme. It is not necessary that petitioners expressly agreed that such a communication be made. It is enough if there was an implicit understanding that such a call would be made. The nature of the scheme was such that the jury could have found that its success reasonably required that a telephone call be made to bring Salim into Mexico. The scheme necessitated that Huff persuade Salim personally, with the aid of some Mexican police officers or with persons posing as officers, that it was in Salim's best interests to pay Huff money to obtain his son's release from custody. The jury could also have found that petitioner's scheme contemplated that they place themselves beyond the jurisdiction of the laws of the United States, thereby making a telephone call a necessary step in its execution. Another circumstance showing Nicholson's awareness of the telephone call is his presence in the restaurant at the time of the meeting between Huff and Salim. In this respect, Nicholson himself testi-

fied that he was in the Juarez restaurant for about ten minutes before Salim arrived (R. 286) while other evidence showed that Salim met Huff in the restaurant ten minutes after Huff telephoned him (R. 125).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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No. 441

ROBERT FREDERICK HUFF and WILLIAM CONSTANTINE NICHOLSON,

Petitioners,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY FOR PETITIONERS

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UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY FOR PETITIONERS

I. The Substantive Offense

A. The Indictment

The petition (pp. 8-9) demonstrated that while the indictment charges a scheme to defraud Salim Abraham, the scheme which it describes is one to obtain money from him, not by deceit, but as the price for releasing his son from arrest.

The government replies to our analysis with a characterization. It says (p. 7) that the scheme charged "is fraudulent in its entirety." But the only allegation of fraud to which it can point (*ibid.*) is the false representation made to Nazry, not to Salim, for the purpose of luring the former to Mexico. It then cites cases (*ibid.*) to the

effect that since the gist of the offense consists in *devising a scheme* to defraud, it is unnecessary to allege or prove that the false pretenses contemplated by the scheme were in fact communicated to the intended victim. This principle has no application here. For the fatal flaw in the present indictment lies not so much in its failure to allege that false representations were made to Salim as in the fact that the scheme which it describes did not contemplate making false representations to him or deceiving him in any other way. Thus, it appears from the indictment that the scheme charged did not rest on deceit but on extortion as the means of obtaining money from the victim.

Accordingly, *Muench* v. *United States*, 96 F. 2d 332 (C. A. 8), cited by the government (pp. 10-11), is likewise beside the point. For the indictment in that case charged a scheme to deceive the victim by falsely representing that one of the defendants had given birth to his child. The defense argued, not that the indictment was defective, but that it appeared from the evidence that this fraud was so palpable that it could not have been intended to deceive. Here, however, the indictment is bad because it does not allege a scheme to defraud the victim in any manner, palpable or otherwise.

The government attempts to distinguish *Fasulo* v. *United States*, 272 U. S. 620, on the ground that the indictment there did "not charge anything in the way of fraud or deceit" (p. 10). That is not the fact. The *Fasulo* indictment alleged that "the scheme and artifice was that the defendants would write and send, through the post office establishment of the United States, certain letters to one Frank Lauricella, wherein they would pretend that they intended to and would kill and murder the said Laurincella," unless he paid them $2,000. See *Lupipparu* v. *United States*, 5 F. 2d 504 (C. A. 9).[1] Yet, the Court in

[1] This was the same indictment which the Court had before it in *Fasulo*. See the latter at 625.

Fasulo did not think it necessary to consider whether the representation made in the letters was true or false. It reversed the conviction because the nature of the scheme showed its dependence on the coercion of fear and not on deceit as the means for mulcting the victim. Since this is equally true of the scheme alleged in the present indictment, the decision in *Fasulo* is governing.

B. The Evidence[2]

The government asserts (p. 11) that the false representation made to Nazry to lure him to Juarez was alone sufficient to establish a scheme to defraud. But the scheme charged was a scheme to defraud *Salim*. And the government does not and cannot explain how a false representation not made to or designed to deceive the latter can serve as evidence of a scheme to defraud *him*.

The government also argues (pp. 11-12) that false representations made to Salim that Nazry had robbed Huff and had been legally arrested "were fairly embraced within the scheme charged" in the indictment. But the scheme which the indictment describes did not involve practicing any deceit on Salim. Accordingly, it could not embrace the particular statements on which the government now relies, assuming that each of them had been found by the jury to have been made, to have been false, and to have been a part of the scheme to defraud. Moreover, as our petition demonstrated (p. 10), none of these assumptions is warranted.[3]

---

[2] The lack of any evidence connecting Nicholson with the alleged scheme is discussed in connection with the conspiracy charge, *infra*.

[3] Petitioners' requested instruction on the subject of the Huff burglary, which the government criticizes (p. 11, n. 5), was less favorable to them than they were entitled to have. For the jury should have been told that if it found that Huff honestly *believed* Nazry to have been the burglar, petitioners could not be convicted of a scheme to defraud Salim by false representations as to Nazry's guilt.

II. The Conspiracy Charge

A. The Indictment

The petition argues (pp. 11-14) that the conspiracy count (R. 5-6) is defective because it fails to describe the nature of the alleged fraudulent scheme. The government replies (pp. 9-10) that, "Coming as it does after the six substantive offenses," the conspiracy count was sufficient and, moreover, that petitioners did not make "any showing that they were misled."

In the first place, as we have shown, the substantive counts do not charge a fraudulent scheme. Even if they did, an indictment is not a guessing game, and a defendant will not be left to deduce the nature of the offense with which he is charged in one count from the fact that it follows after other counts charging other offenses. And, of course, a defendant is not required to make a showing of prejudice from a vague indictment. Its vagueness is prejudicial *per se*, and this not only because it fails to inform him of the nature of the charge but also because it does not protect him against double jeopardy. Additionally, it "gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture." *Russell v. United States*, 369 U. S. 749, 766. This is precisely what the government is attempting in the present case.

The government cites three cases which, as it says (pp. 8-9), hold that a conspiracy indictment "need not allege the objectives of the conspiracy in such detail as is required to charge a substantive violation." This is so because an agreement to commit a crime may leave some of the details for future determination. All that the gov-

ernment's cases hold is that details such as these need not be alleged.[4]

The vice in the present conspiracy count is not that it omits such details but that it fails to do more than give a generic description of the crime which was the alleged object of the conspiracy charged. Hence, the count is defective under the standards of *United States* v. *Cruikshank*, 92 U. S. 542, and the other conspiracy cases cited in the petition (p. 12).[5]

B. The Evidence

1. The government does not dispute the principle (Pet., pp. 14-15) that in a prosecution for conspiracy to use the mails or wires to defraud, an intent by each conspirator to use the mails or wires for that purpose must be proved. But in answer to our argument that there was no evidence to show such an intent on Nicholson's part, the government asserts (p. 13) that there was "ample evidence" to show that he and Huff agreed not merely that a telephone call be made but, more, that the telephone call should be between Juarez and El Paso.

The "ample evidence" on which the government relies turns out to be nothing except Nicholson's presence in the

[4] *E.g.*, the names of the individuals who would be solicited to make false entries of land as part of a conspiracy to suborn perjury in *Williamson* v. *United States*, 207 U. S. 425, 449, or the detailed duties of the Bureau of Animal Industry employees who were the victims of the conspiracy to commit assault in *Thornton* v. *United States*, 271 U. S. 414, 423. In *Wong Tai* v. *United States*, 273 U. S. 77, the remaining case cited by the government, the objection to the failure of the indictment to allege particulars was even less substantial.

[5] It is true, as the government states (p. 10, n. 3), that the indictment dismissed in *United States* v. *Mercer*, 133 F. Supp. 288, alleged no particulars of any kind. But the precise ground on which the indictment was found insufficient was (at 291) that "it fails to describe the fraudulent scheme." The present indictment is defective for the same reason.

Juarez restaurant "at the time of the meeting between Huff and Salim" on the morning of April 27, 1960 (Opp., p. 13).

It is true that the government also envelops this shred of circumstantial evidence in a cloud of speculation to show that the fraudulent scheme "reasonably required" the making of a telephone call from Juarez to El Paso (*ibid.*). But all this is speculative even as to Huff. As to Nicholson, it is speculation within a web of circular reasoning. Without an iota of evidence, direct or circumstantial, to show that Nicholson agreed to, intended, or concurred in the use of the telephone between Juarez and El Paso, the government resorts to a series of four inferences to show that Nicholson had "an implicit understanding" with Huff that the call to Salim be made (*ibid.*).

As for Nicholson's presence in the restaurant when Salim arrived, that is not even proof that he knew Huff had used the telephone at all, let alone that he knew whom Huff had called or the purpose of the call. In fact, the government's conclusion that Nicholson was in the restaurant when Huff made the call is itself an inference from two thin strands of circumstantial evidence—his own testimony that he was in the restaurant about ten minutes before Salim arrived and Salim's testimony that he got there about ten minutes after he received the call from Huff (Opp., pp. 13-14). This is a shaky foundation even for the conclusion that Nicholson was in the restaurant when the call was made. But, in any case, it is painfully insufficient as proof that Nicholson agreed to or concurred in the use of the wires between Juraez and El Paso in execution of the alleged scheme.

2. As to the proposition that Nicholson was partner to the substantive crimes or to the alleged conspiracy, the opposition (p. 12) does no more than summarize the three pieces of circumstantial evidence relating to him and makes no effort to meet our showing that these were wholly insuffi-

cient to establish that he participated in the alleged scheme or conspired to do so (Pet., pp. 16-18).

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